No. 91-1523

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**In the**

**Supreme Court of the United States**

October Term, 1990

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Florence County School District Four, et al.

**Petitioners,**

v.

Shannon Carter, By and Through Her Father and Next Friend, Emory Carter

**Respondents.**

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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# BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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APR 24 1992
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## INTEREST OF THE AMICUS CURIAE

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts which NSBA represents receives or is eligible to receive financial assistance under the Individuals with Disabilities Education Act 20 U.S.C. § 1401 et seq. (IDEA or the Act). The subject of this case is of great importance to school districts across the country from both an educational and financial perspective.

**REASONS FOR GRANTING THE WRIT**



The courts below have sidestepped the carefully crafted process established by Congress in the IDEA to ensure that every child with a disability receives a "free appropriate public education" (FAPE) and, instead, contrary to the explicit rulings of this Court, have substituted their own judgment for that of South Carolina's Department of Education and the local school officials.

**STATEMENT OF THE CASE**

Amicus incorporates by reference thereto the statement of the case contained in Petition for Certiorari.

**ARGUMENT**

**I. The lower courts' decisions will result in school districts diverting financial support from important public education programs into private education, even where an "appropriate" education can be provided in the public schools.**

This case is extremely important to school districts across the country because of its financial implications. Private schools

are usually substantially more expensive than public placements, particularly when compared to a "mainstreamed" or partially mainstreamed public environment. When the Education of the Handicapped Act (now Part B of IDEA) was passed in 1975, Congress made the commitment to provide states with 40% of the national average per pupil expenditure for each eligible child to be used to defray the "excess costs" associated with meeting the educational needs of a child with a disability. Unfortunately, Congress has never come close to meeting that promise. Funding for the program has never exceeded 12% of the national average per pupil expenditure -- currently funding equals only 7%. U.S. Dept. of Education, Justification of Appropriation Estimates to the Congress Fiscal Year 1993 at F-19 (1992). Special education expenditures have risen from approximately $11.75 billion in 1982-83 to over $16 billion in 1986-87, with the federal government picking up only



slightly more than $1 billion. Statement of the Ad Hoc Coalition to Increase Federal Funding for the Education of Children with Disabilities, issued Spring, 1992 by the National School Boards Association, American Association of School Administrators, Council for Exceptional Children, National Association of State Directors of Special Education, National Association of State Boards of Education and National Parent Network on Disabilities.

A survey of 18 states conducted by the National Association of State Directors of Special Education showed that although the number of special education students increased from approximately 6% over the period from fiscal 1985 to fiscal 1991, state special education expenditures increased in those states by nearly 70%. The cost of private placements was a major contributor to this increase.

The combination of inordinate expense of special education together with the increase in societal pressures on the educational system (e.g. the increase in families living in poverty,[1] the effects of alcohol/drug dependency and the increase in populations of immigrants[2]) together with a higher increase in the inflation rate for schools[3] threatens to overload the public education system in many states and localities.

The case at bar is not the only example of courts giving parents a veto power over the placement of their child. For example, a court of appeals recently held that even where the school district adopts an "appropriate"

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[1] In 1985, 12.5 million children were classified as living in poverty. The proportion has risen from 1 in 8 during the 1970s to 1 in 5.1. Cost of Education, published by Education Research Service, Glen E. Robinson and Nancy J. Protheroe, page 82.

[2] Projections show the number of limited English proficient children (ages 5 to 14) increasing 16.7% between 1980 and 1990, and increasing 41.7% between 1980 and 2000. Id.

[3] A School Price Index, developed in 1975, demonstrated a more rapid rate of inflation for the special mix of goods and services unique to education for the period from 1975 to 1986 than the Consumer Price Index, 132.4 points as compared to 110.1 points. Id. at 27.



educational program for the child and follows all procedural requirements to the letter -- the school district must pay for the private school placement of the child if parents evidence sufficient hostility to the state placement. Board of Education of Community Consolidated School District 21 v. Brozer, 938 F.2d 712 (7th Cir. 1991), cert. denied, 111 S.Ct. _____ (1992).

**II. Contrary to Congress' intention in passing the IDEA and in direct disregard of this Court's rulings, the courts below have assumed the role of educational decisionmakers and ordered a local school district to pay for an educational placement that does not meet State educational standards.**

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process . . . .

Milliken v. Bradley, 418 U.S. 717, 741 (1974).

NSBA, speaking for school districts across this land, is deeply concerned about

the implications of the lower courts' decisions in the instant case, on the traditional control of local and state educational officials over public education.

Congress did not intend when it passed the IDEA to transfer control over substantive educational policy decision from public school officials to the courts. Instead it is a grant statute setting out broad procedural mechanisms to assure that appropriate educational programs are provided to children with disabilities.

This Court, too, in its first case to interpret the Act, stated:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.
>
> * * *
>
> We previously have cautioned that courts lack the 'specialized knowledge and experience' necessary



> to resolve 'persistent and difficult questions of educational policy.' [Citation omitted.] We think that Congress shared that view when it passed the Act. . .
>
> Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies . . . and in the formulation of the child's individual educational program. . .

Board of Educ. of Hendrick Hudson Central School District v. Rowley, 458 U.S. 175, 207-208 (1982).

The purpose of the Act is to ensure that each child with a disability, as defined under the statute, receives a "free appropriate public education." The statute includes a number of affirmative requirements relating to the evaluation of the child, consultation with parents and educational experts, development of an individualized education program (IEP) and, finally, specific due process

requirements. The rights guaranteed under the IDEA are uniquely educational in nature.

Congress carefully crafted the administrative procedures under the IDEA to ensure that parents, the school district, teachers and other specialists work together to design an "appropriate" educational program for the child, to determine the child's unique educational needs, an appropriate placement to meet those needs, and the "related services" supporting them.

The requirement that the school district adopt an IEP for each child with a disability is the "modus operandi of the Act. Burlington School Committee v. Dept. of Educ., 171 U.S. 359, 368 (1985). Under the Act an eligible child with a disability has the right to be evaluated periodically by a group of experts to determine the child's individual educational needs and to set individual goals for that child. Parents have substantial input into the process through notice at every



stage, the right to obtain an independent evaluation which the school district must review, and ultimately, the right to a hearing where there is a dispute. Congress intended the IEP process to be a continuing cooperative process between the experts in the school district and the parents of the child with a disability.[4] Consistent with this intent, the

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[4] [It is the method] of involving the parent and the handicapped child in the provision of appropriate services, providing parent counseling as to ways to bolster the educational process at home, and providing parents with a written statement of what the school intends to do for the handicapped child.

. . . [T]he Committee intends to ensure adequate involvement of the parents or guardian of the handicapped child, and the child (when appropriate) in both the statement and its subsequent review and revision . . . By changing the language of this provision to emphasize the process of parent and child involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child."

S. Rep. No. 168, 94th Cong., 1st Sess. 11 (1975).

During debate on the Act the sponsors discussed the IEP conference at length. Senator Stafford, for example, stated:

IEP in this case stated that the parents could request that the district convene an IEP conference at any time. The parents chose not to do so.

The courts below, ignoring this Court's warnings about judicial involvement in

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> [A]n extremely important aspect is the requirement that each handicapped child will have individual planning conferences. The participants will include the parents, the teacher, and a qualified supervisor or provider of special education services. . . An additional benefit that will result from these conferences is one that is too often overlooked. Not only will the child be better served, and the parents better informed of the limitations their child has due to a particular handicap, but the teacher will learn from this experience as well.
>
> As we look more and more toward children with handicaps being educated with their "normal" peers, we must realize, and try to alleviate the burden put upon the teacher who must cope with that child and all the others in the class as well. The teacher needs reinforcement and a better understanding of the child's abilities and disabilities.
>
> It is hoped that the participation in these conferences will have a positive effect on the attitude of the teacher toward the child and an understanding of the child's problems in relating to his or her peers because of a handicapping condition.

121 Cong. Rec. S. 10961 (daily ed. June 18, 1975).



educational decisions, have subverted this process by invalidating the school district's IEP based on an inherently educational judgment and then deferring to the parents' wishes while dismissing state educational standards as important but not crucial to an appropriate education. Appendix to Petition 19a.

The decision of the courts below will make it impossible for school districts to perform their function. If the district meets its responsibility to actively consider the parents' concerns at the IEP level and adopts goals recommended by the parents' own expert -- and the parents later change their minds -- the school district can be deemed by the court to have failed in its statutory obligations for not having adopted different goals. If the parents unilaterally place their child in a private school and, after a number of years, the child successfully completes her education -- the school district by virtue of its

alleged default on its statutory duty is forced to pay for the private education. If the state adopts standards for all education in the state, the courts are allowed to ignore the standards as long as the child is deemed to have succeeded in the private setting.

The precedent established by the lower courts' decisions disregards the teachings on local control of education, of every decision of this Court. Under the guise of the IDEA, the courts usurped the traditional control of public school officials and assumed the role of educational decision-maker. In this case the school district set educational goals for a child based on specific suggestions of the experts for the parents and offered the child itinerant services in response to the parents' rejection of a more intensive resource room placement; the parents accepted the IEP and the child progressed to the next grade under the plan. Both the local and the state hearing officers upheld the IEP against the



parents' challenges. Nevertheless, the courts, based solely on their own evaluation of the goals in the plan -- not the adequacy of the placement -- decided that the district's placement was inappropriate in light of the school district's so-called failure to meet its obligations under the IDEA and ordered the school district to reimburse the parents for the costs of a placement which does not meet the standards set by the state for the education of all children within their jurisdiction.

In contexts unrelated to the IDEA, this Court has repeatedly emphasized the primacy of State and local educational authorities in determining issues of educational policy.[5] In

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[5] The U.S. Congress has also expressly voiced its commitment to local control over educational policy. The most recent expression of that commitment appears in the Department of Education Organization Act, 20 U.S.C. 3401. That act provides in Section 103:

> (a) It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to

Epperson v. Arkansas, 393 U.S. 97, 104 (1968) the Court stated:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and

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> strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the State.
>
> (b) No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school or school system, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.



> sharply implicate basic constitutional values.

Earlier, in Abington School District v. Schempp, 374 U.S. 203, 300-301 (1963) (Brennan J., concurring), Justice Brennan issued the following words of caution:

> We should heed Mr. Justice Jackson's caveat that any attempt by this Court to announce curricular standards would be "to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and servicing highly localized groups which not only differ from each other but which themselves from time to time change attitudes." Illinois ex rel. McCollum v. Board of Education, supra, [333 U.S.] at 237.

This deference to local control is a recognition of the varying wants and needs of the Nation's diverse and varied communities, each with its unique character, standards and sense of social importance of a variety of values. Mercer v. Michigan State Board of Education, 379 F.Supp. 580, 585 (E.D. Mich.) aff'd mem. 419 U.S. 1801 (1974).

This Court clearly reaffirmed its deferential approach on educational issues in its decision in Board of Educ. of Hendrick Hudson Central School District v. Rowley, supra. This Court held that courts, in assuring that the requirements of the IDEA (then the Education for All Handicapped Children Act) are met, must avoid imposing their view of preferable educational methods upon states. That, however, is exactly what the courts in the instant case have done.

First, in declaring the public placement to be inappropriate for the child's needs, the courts below summarily rejected the IEP developed by the school district and initially approved by the parents, because of the courts' belief that the goals in the plan were not sufficiently high. The courts took the goals out of the context of the whole education plan, focusing instead on the conclusion that the goals were insufficient to assure that the child progressed from grade to



grade, although the parents' expert had suggested limited goals as a means to preserve and encourage the child's self esteem. Furthermore, by putting undue emphasis on its view that a four month goal is insufficient to assure educational progress, the courts ignored the reality, i.e., that the child's test scores improved in the public placement to the extent that she was able to progress to the next grade at the end of the school year.

The lower courts also ignored the fact that the parents could have by the express terms of the IEP requested that the goals be amended for the next school year, but instead chose to enroll her in a private school and request a hearing solely on the placement issue. The appeals court quite erroneously characterizes this case as one in which "the parents are forced by the school system's violation of the Act to unilaterally withdraw the child from the public schools and, on their own seek alternative schooling." The

only basis the court cites for the school district's "violation" of the Act is the educational goals which were limited at the suggestion of the parents' own social worker. It is difficult to imagine how the inclusion of these easily amendable educational goals constitutes a default on the part of the school district of its responsibility to provide an appropriate placement for the child, especially when there is no evidence that the school district was rigidly wedded to the goals; in fact, the school district was open to requests at any time to re-evaluate them.

Second, the courts held the private placement to be "appropriate," even though it did not meet state educational standards. The courts justified this ruling on the basis that the child progressed from grade to grade, and thereby satisfied the Rowley standard of providing some educational benefit. The courts refused to accept the school district's



IEP as appropriate allegedly because the goal of four months progress a year would not have allowed the child to achieve a level comparable to the one attained in the private school. The comparison drawn by the courts is inapposite for several reasons. First, the courts seem to make the educational assumption for which they provide no basis that the goals set in the child's IEP would have controlled her actual progress and limited her achievement level to four months per year. Second, the courts contrast the goals set for the second year of the IEP with the student's actual achievement level three years later and conclude that the public placement was inappropriate.

This approach puts the onerous burden on the school district of disproving the court's baseless educational projections about the probable outcome of the IEP in the face of after-the-fact evidence of the success of the private school placement. The imposition of

such a burden is contrary to the rulings of several circuit courts. These circuit courts have held, and amicus submits that these courts are correct, that the party challenging the IEP should have the burden of proving that the educational placement established by the IEP is not appropriate.

> "We are convinced that the central role of the IEP in the educational scheme contemplated by the EAHCA and in the standard of review developed in Rowley gives rise to a presumption in favor of the educational placement established by [the child's] IEP. Moreover, because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate."

Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1982), aff'd in part, rev'd in part, on other grounds, sub nom.. Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984). See, also, Doe v. Defendant I, 898 F.2d 1186 (6th Cir. 1990); Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990); Landau v. Long Beach, 947



F.2d 950 (9th Cir. 1991); Doyle v. Arlington County School Bd., 953 F.2d 100 (4th Cir. 1991). In the instant case it is the parents who challenged the IEP but the lower courts clearly did not place the burden of proof on the parents. In Rowley, this Court said, "the fact that section 1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings."

Finally, the lower courts' determination that the private school is an appropriate placement and "proper under the Act," a condition required by this Court for reimbursement, is troublesome because it ignores the Act's explicit requirements encompassed within the definition of "free appropriate education." Here, the education offered by the private placement met neither the requirement of following the IEP procedures under the Act, nor the "standards

of the State educational agency." 20 U.S.C. 1401 (a)(18)(B) and (D). Under their interpretation of the IDEA, whether a private placement itself qualifies as a FAPE becomes unimportant once it has been deemed that the school district failed to provide an appropriate educational placement.

**III. This era of educational reform in the country is a particularly critical time for the courts to restrain themselves from interfering with local educational policymaking.**

The state standards that the courts below so lightly dismiss are not adopted lightly by the states. All states have standards for accreditation of schools and school districts, both public and private. Some states require certain minimum pupil-teacher ratios to be met before a school or district will be accredited. Most states require establishment of guidance and counseling programs with certain specified staff requirements relating to certification, pupil-counselor ratios, etc. All but two states require that teachers be



certificated as a prerequisite to employment. In order to meet the credentials requirement teachers must meet standards relating to level of higher education, experience (e.g. student teaching), morality, health, citizenship etc. Credentials can also be revoked upon certain grounds, such as failure to meet continuing education requirements, false statements on applications or failure to meet standards of morality (e.g. a finding that an employee is guilty of child abuse.)

In recent years there has been a national push to raise standards in the public schools for both employees and students. This "educational reform" movement began in 1983 with the issuance of three reports, the U.S. Department of Education's A Nation at Risk, the Twentieth Century Fund's Making the Grade, and the Carnegie Foundation's High School: A Report on Secondary Education. President Bush ran for election on a platform of "The Education President" and in 1990 issued his

National Education Goals. All of these reports urge states, local school districts, state legislatures and the public to work together to reform public education so as to make the system more effective in assuring that this country will be able to compete in the world of the next century.

On July 28, 1990 the National Governors' Association Task Force on Education issued a report on State Strategies for Achieving the National Education Goals. The governors' goals had been established in 1986. National Governors Association Center for Policy Research and Analysis, Time for Results: The Governors' 1991 Report on Education. Washington, D.C., National Governors Association. The goals covered topics such as decreasing the dropout rate, demonstration of competency in certain core subjects, upgrading teaching, etc. The strategies include subjects such as the development of new forms of performance assessment for licensure of



teachers and administrators, accountability for colleges and universities for pass rates on licensure examinations, alternative routes to licensure.

Educational policymakers at all levels of government are currently expending a great deal of time, thought, debate and financial resources in improving educational standards. Yet the courts below reject all that in favor of their own standards developed in the context of one case involving one child with a disability.

The IDEA was designed to assure "access" to a publicly financed education. It was not designed to mandate that public school districts finance the education that the parents of a child with a disability and the courts deem is best for the child at the expense of compliance with state education standards. That standard was expressly rejected by this Court in Rowley.

> Congress' desire to provide specialized educational services, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States.
>
> The [lower courts] erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. . . We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

458 U.S. at 200-201.

Like the lower courts in Rowley, the lower courts here also are attempting to impose a standard of what is "best" for the child. Based on their conclusion that the goals were insufficient, the courts overturned the entire IEP in favor of a private institution that does not meet state education standards.

The rule of law established by these courts is that parental choice of placement



prevails in the absence of a showing that the child is not succeeding in the placement. And, as long as the parents are satisfied with the placement, the courts resist second-guessing their view on "success." They will, however, readily second-guess or ignore the judgment of state and local educational officials.

## CONCLUSION

The decision below imposes great financial costs and raises other severe problems for the continued operation of school districts throughout the United States. Both lower courts have ignored the clear words of the statute, the teachings of this Court in cases such as Board of Educ. of Hendrick Hudson Central School District v. Rowley, supra, and the educational standards and policies of state and local education officials -- and deferred instead to the parents' desire to remove the child from the public schools in favor of a private setting.

School boards across the country urge this Court to grant review in this case and to preserve the traditional role of state and local school authorities by reversing the decision of the Fourth Circuit.

Respectfully submitted,

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